A

WONG JOO SEN

v.

PP

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COURT OF APPEAL, PUTRAJAYA
TENGKU BAHARUDIN SHAH JCA
HELILIAH MOHD YUSOF JCA
KN SEGARA JCA
[CIVIL APPEAL NO: P05-73-03]

C

14 APRIL 2008

CRIMINAL LAW: *Dangerous drugs - Trafficking in methamphetamine - Drugs and accused in locked bedroom - Forced entry - Accused seen throwing drugs into bathroom - Whether having mens rea possession -*

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Whether having custody, control and knowledge - Drugs packed into 30 small packets - Whether showing intention to distribute - Dangerous Drugs Act 1952, ss. 37(d), 37(da)(xvi), 39B(1)(a)

This was an appeal against the decision of the learned judge

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convicting the appellant for an offence under s. 39B(1)(a) Dangerous Drugs Act 1952 ('the Act'), *viz.* trafficking in 117.5 grams of methamphetamine (6000 pills), and sentencing him to death. The appellant was arrested alone with the drugs in a locked room. The facts showed that at the time the police party forced

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themselves into the room, the appellant was seen throwing some of the drugs into the bathroom attached to the said room. Before the learned trial judge, the appellant put up the defence that he had no knowledge of the drugs and that the drugs were in fact planted in the bathroom by his friend, one Ah Nam. The learned

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judge totally disbelieved and rejected the defence story, and hence the conviction and sentence. Before the learned justices of appeal herein, the only issue that merited deliberation was whether there was any reason to disturb the learned judge's finding that the appellant had exclusive care and occupation of the room, as well as custody and control and knowledge of the drugs in question.

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Held (affirming conviction and sentence)
Per KN Segara JCA delivering the judgment of the court:

(1) In determining whether the appellant was in possession of the

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drugs, the learned judge clearly had in mind all the leading authorities on the issue of "possession" and all the physical and mental elements necessary to constitute *mens rea* possession of the drugs. (para 26)

(2) In this case, there was no necessity to rely on any statutory presumptions under the Act to establish possession of the drugs by the appellant. Having correctly made a finding that the appellant had exclusive care and occupation of the room and that no one else had access thereto, the learned judge made a further finding, with which we concur, that the appellant had custody and control, as well as knowledge of the drugs. (para 26)

(3) The learned judge having made a finding of possession independent of any statutory presumptions under the Act, in particular s. 37(d), the only issue that needed to be addressed is whether the prosecution has proved beyond reasonable doubt that the appellant was trafficking in the said drugs. (para 27)

(4) The prosecution has proved a case of trafficking against the appellant beyond reasonable doubt and there is no reason to disturb the learned judge's findings and decision. The weight of the methamphetamine exceeded the required weight to invoke the presumption of trafficking under s. 37(da)(xvi) of the Act by more than twice the amount. The appellant also did not lead any evidence that he was a drug addict and therefore the question of whether the drugs were for his own consumption, such as to rebut the presumption under s. 37(da)(xvi), did not arise. Likewise, considering the large quantity of the pills in the three packages recovered and the manner in which they were packed (30 small plastic packets, each containing 200 pills), the irresistible inference is that the pills were intended for distribution loosely or in packets (by sale or otherwise) to third parties known or unknown to the appellant. (paras 27 & 29)

Bahasa Malaysia *Translation Of Headnotes*

Ini adalah rayuan terhadap keputusan yang arif hakim kerana mensabitkan perayu dan menjatuhkan hukuman mati ke atasnya, atas satu kesalahan di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta') iaitu mengedar 117.5 gram methamphetamine (6000 pil). Perayu ditangkap berseorangan dengan dadah berkenaan di dalam satu bilik yang berkunci. Fakta menunjukkan bahawa semasa anggota polis memecah masuk ke dalam bilik, perayu dilihat membuang sebahagian dadah ke dalam bilik air yang bercantum

dengan bilik tersebut. Di hadapan hakim bicara, perayu membangkitkan pembelaan bahawa beliau tidak mempunyai pengetahuan tentang dadah dan bahawa dadah tersebut sebenarnya diletak di bilik air oleh kawannya yang bernama Ah Nam. Yang arif hakim tidak mempercayai dan menolak keseluruhan cerita perayu sekaligus menyebabkan sabitan dan hukuman. Di hadapan yang arif hakim-hakim rayuan di sini, satu-satunya isu yang memerlukan pengupasan adalah sama ada wujud alasan-alasan untuk mengganggui dapatan yang arif hakim bahawa perayu mempunyai penjagaan dan penghunian ekslusif bilik, serta jagaan, kawalan dan pengetahuan mengenai dadah berkenaan.

Diputuskan (mengesahkan sabitan dan hukuman)
Oleh KN Segara HMR menyampaikan penghakiman mahkamah:

(1) Dalam menentukan sama ada perayu mempunyai milikan dadah, yang arif hakim telah mengambilkira semua autoriti utama berkaitan isu "milikan" dan semua elemen fizikal dan mental yang diperlukan bagi membuktikan *mens rea* milikan dadah tersebut.

(2) Dalam kes ini, tiada keperluan untuk bergantung kepada mana-mana anggapan statutori di bawah Akta bagi membuktikan milikan dadah oleh perayu. Setelah membut dapatan dengan betulnya bahawa perayu mempunyai penjagaan dan penghunian ekslusif bilik dan bahawa tiada orang lain mempunyai akses kepada bilik, yang arif hakim membuat dapatan lanjut, yang mana kami mempersetujuinya, bahawa perayu mempunyai jagaan dan kawalan serta pengetahuan tentang dadah.

(3) Dengan yang arif hakim membuat dapatan milikan tanpa bergantung kepada mana-mana anggapan statutori di bawah Akta, terutama s. 37(d), maka isu tunggal yang perlu ditangani adalah sama ada pendakwaan telah membuktikan bahawa perayu telah mengedar dadah tersebut di luar keraguan munasabah.

(4) Pendakwaan telah membuktikan satu kes mengedar di luar keraguan munasabah dan tiada alasan untuk mengganggui dapatan-dapatan dan keputusan yang arif hakim. Berat methamphetamine melebihi lebih dari sekali ganda berat yang diperlukan bagi membangkitkan anggapan mengedar di bawah s. 37(da)(xvi). Begitu juga, perayu tidak mengemukakan

sebarang keterangan bahawa beliau adalah penagih dadah, dan oleh kerana itu, persoalan sama ada dadah tersebut adalah untuk kegunaan peribadinya, yang boleh menyangkal anggapan di bawah s. 37(d)(xvi), adalah tidak berbangkit. Selain itu, mengambilkira kuantiti pil dalam 3 bungkusan yang dijumpai adalah banyak serta cara pil-pil tersebut dibungkus (30 paket kecil dengan setiap satu mengandungi 200 pil), maka inferens tidak dapat tidak yang boleh dibuat adalah bahawa terdapat niat untuk mengedar pil-pil tersebut, sama ada secara berasingan atau di dalam paket-paket (melalui jualan atau sebaliknya), kepada pihak-pihak ketiga sama ada yang dikenali oleh perayu atau pun tidak.

Legislation referred to:
Dangerous Drugs Act 1952, ss. 37(da)(xvi), 39B(1)(a)

For the appellant - Rajit Singh
For the respondent - Wong Chiang Kiat DPP

[Appeal from High Court, Pulau Pinang; Criminal Trial No: PCT 45-11-02]

Reported by Wan Sharif Wan Ahmad

JUDGMENT

KN Segara JCA:

[1] The appellant (accused) was charged for trafficking in 117.5 grammes of methamphetamine at 1184, Jalan Satu Mukim 6 Kepala Batas, Seberang Perai Utara, Pulau Pinang, on 10/3/2001 at about 7pm. He was convicted for the offence of trafficking in dangerous drugs under s. 39B(1)(a) of the Dangerous Drugs Act 1952 (the Act) by the High Court, Pulau Pinang and sentenced to death.

[2] This appeal is against both conviction and sentence by the accused.

[3] Briefly, the facts are as follows.

[4] Upon information received, SP5, Inspector M Muniandy led a party of police to raid house No. 1184, Jalan Satu, Mukim 6, Kepala Batas. When he reached the address he found the gate of the house as well as the front door open. The police party broke into three teams, one team guarding the back part of the house,

A another team guarding the front portion of the house, whilst SP5 together with 2 other police personnel (SP6 and SP8) entered the house, through the open front door. SP5 saw a group of about 5 ladies playing a game of cards in the dining area of the house. He identified himself to one of the ladies. Immediately after that SP5
B and SP6 went to a bedroom on the right, at the rear portion of the house whereas SP8 was directed by SP5 to guard the rear exit door of the house.

[5] SP5 knocked on the door of the bedroom and shouted
C 'police, open the door' twice. However, there was no response. SP5 forced open the door. SP5 and SP6 kicked the door. After the second attempt, they managed to break open the door. SP5 rushed into the said room and at that very moment SP5 saw the accused running from the direction of the bed to the front of the
D attached bathroom and throw something from his right hand in the direction of the bathroom.

[6] The accused was arrested by SP5 with the assistance of SP6 after a brief struggle. Three plastic packages were recovered from the floor of the bathroom, near the door of the bathroom.
E SP5 testified:

> ... Saya kata satu bungkusan berada didalam bilik air. 2 lagi bungkusan berada dalam bilik air dihadapan bungkusan yang pertama menghadap ke pintu bilik air.

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[7] Each of the packages measured about 4" x 3" in size. The said three plastic packages contained a total of 6,000 pills with the initial 'WY' stamped on the back of each pill.

[8] The three packages were each wrapped in clear plastic.
G Inside each package there were two bundles of five blue plastic packets. Each of the two bundles of five blue plastic packets was held together by a rubber band. Each of the (10) blue plastic packets in each of the three packages contained 200 pills. There were altogether 30 blue plastic packets.

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[9] SP5 testified how he examined the packages in his office at the police station in the presence of the accused, as follows:

> Pertama sekali saya buka bahagian luar iaitu plastik lutsinar. Di
I dalamnya terdapat tiga keping kertas warna putih. Apabila saya buka 3 keping kertas warna putih, didalamnya terdapat 2 ikatan getah berwarna merah. Setiap ikatan mempunyai 5 paket plastic warna biru.

Jumlah kedua-duanya ikatan ada 10 paket plastik warna biru

Setiap paket plastic mengandungi 200 biji pil WY berwarna merah dan hijau dimana pil warna merah adalah lebih dan pil warna hijau adalah sedikit.

Bungkusan plastic lutsinar kedua dan ketiga juga saya buka.

Keadaan juga adalah sama dengan bungkusan pertama yang saya buka.

[10] The pills were sent to the chemist (SP3) for analysis and found to be methamphetamine with a net weight of 117.5 grammes. Methamphetamine is a dangerous drug listed in Part III of the First Schedule of the Act.

[11] The accused's first line of defence was that he had no knowledge of the drugs and the said drugs do not belong to him. This can be seen from his caution statement, tendered by the defence (D66), given to the police as early as 14 March 2001. The relevant part reads:

S : Kenapa kamu ditangkap polis?

J : Pada 10.3.2001 pukul 7.30 pagi saya balik rumah dari market dan terus tidur sampai petang. Polis kemudian mai rumah saya. Polis ketuk pintu. Saya tak sedar. Polis kemudian pechah pintu bilik saya dan masuk. Polis ada jumpa itu ubat WY dalam toilet bilik saya. **Saya tak tahu itu ubat mana datang**. Polis kemudian telah tangkap saya.

S : Adakah ubat itu kamu punya?

J : **Bukan saya punya**. Tak tahu mana mari. (emphasis added)

[12] His second line of defence, which surfaced at his trial when he gave his evidence on oath, was that the drugs were in fact planted in the toilet by his friend Ah Nam. The accused called his mother (SD2) to testify and corroborate this line of defence.

[13] The accused testified that before his arrest he traded in crystals. On 9 March 2001 at about 11pm he went to his girlfriend's house and was with her till 6am on 10 March 2001. Then, on his way home, he stopped at the market to have his breakfast.

[14] Upon returning home, at about 7am after his breakfast, he had a bath, cleaned some crystals and then went to lie down on his bed. However, he could not sleep because he was having a headache. He then decided he would go to his mother's room to get some medication from her. Unfortunately, her room was locked. She was apparently not awake yet. He returned to his room and lay on his bed till about 11am when he realized his mother was by now awake. He got some medication from his mother and returned to his room. He fell asleep after taking the medication.

[15] The accused claimed he was suddenly awakened by his friend Ah Nam, who came up to his bedside and moved him saying, 'Hei, sudah pukul 5!' However, he was still feeling uncomfortable and could not get out of bed. Ah Nam then used the toilet in the attached bathroom and left while he continued to sleep.

[16] The accused has known Ah Nam for 4-5 years and he also knows where Ah Nam lives in Sungei Petani.

[17] The accused testified that he did not tell the police that he suspected Ah Nam had planted the drugs in his room because he came to know about this only after his mother told him.

> Saya tidak beritahu polis saya syak barang itu diletak dalam bilik saya oleh Ah Nam kerana pada masa itu saya tidak tahu.
>
> Saya hanya tahu selepas saya berjumpa dengan ibu saya.

[18] SD2, Chuah Siok Tee, the accused's mother testified that at about 11am on 10 March 2001 the accused had complained to her that he had a headache and could not sleep. She, therefore, gave him some medicine to relieve him of his headache and help him to sleep.

[19] SD2 further testified that at about 1pm. Ah Nam came to the house looking for the accused. She informed Ah Nam that the accused was not well and Ah Nam left. She testified that at about 2pm Ah Nam telephoned to inquire whether the accused was awake. She replied in the negative. She testified that at about 4pm Ah Nam again telephoned her and came to the house at about 5pm.

[20] SD2 testified Ah Nam came to the house carrying a plastic bag in his hand. He inquired from her whether the accused was awake. Upon receiving her reply in the negative Ah Nam retrieved a key to the accused's bedroom from a table and entered the accused's room. Ah Nam, thereafter, came out of the room empty handed and left. She testified that at about 5.30pm Ah Nam again telephoned her to inquire if the accused had woken up and she again replied in the negative. SD2 testified, *inter alia*, under cross-examination:

> Selepas dia masuk, tidak sampai 5 minit dia pun keluar dari bilik.
>
> Dia ada beritahu saya "Auntie, sekarang saya mahu baliklah'.
>
> Semasa dia masuk bilik dia ada bawa bersama beg plastic tersebut.
>
> Semasa dia keluar dia kata tertuduh masih tidur dan belum bangun.
>
> Semasa dia keluar dia tidak bawa beg plastic lagi.
>
> Saya tidak tahu apakah kandungan beg plastic tersebut.
>
> Beg plastic berwarna putih kuning. Dalam ada warna biru. Saya tidak tahu kandungannya
>
> Selepas dia keluar dia pun balik.
>
> Maksud 'dia' ialah Ah Nam.
>
> Selepas dia balik pada lebih kurang 5.30 dia ada telefon saya lagi sekali.
>
> Dia tanya tertuduh telah bangun tidur atau belum.
>
> Saya pun beritahunya belum bangun lagi.

[21] From the testimony of the mother there clearly emerged a picture of a mother conscious of Ah Nam having planted some incriminating exhibits in her son's room and yet she made no effort to inform the police about Ah Nam. She testified that she did not inform the police about Ah Nam because the police did not ask her about Ah Nam! Is such a negative and un-cooperative conduct with the police consistent with the happening of events as detailed by her? SD2 testified under re-examination:

> Saya tidak beritahu polis tentang Ah Nam.
>
> Polis pun tidak tanya tentang Ah Nam

[22] Yet, in cross-examination by the DPP she agreed that Ah Nam was an important witness to exculpate her son from the serious charge. It is no small wonder that the prosecution took the stand that Ah Nam did not exist and that Ah Nam's visit and entry into the accused's room with a plastic bag at 5pm on 10 March 2001 and, thereafter, coming out empty handed was a mere fabrication to save her son from the gallows. The relevant cross-examination was along these lines:

> Cadangan: Oleh kerana anak awak dituduh mengedar dadah, Ah Nam adalah penting untuk membersihkan nama anak awak.
>
> Jawapan: Saya setuju.
>
> Cadangan: Ah Nam tidak ujud. Oleh itu kamu tidak beritahu mana-mana polis tentang Ah Nam.
>
> Jawapan: Saya tidak setuju. Ah Nam memang ujud.
>
> Cadangan: Keterangan kamu bahawa Ah Nam ada datang pada jam 5.00 petang dan masuk ke bilik anak awak dan keluar adalah satu rekaan untuk membersihkan nama anak awak.
>
> Jawapan: Saya tidak setuju. Itu pekara benar. Saya tidak setuju keterangan saya tidak benar dan adalah untuk menyelamatkan anak saya. Saya cakap benar.

[23] On the evidence adduced before the trial court by the prosecution and the defence the only issue for determination was whether the accused had created any doubts on the issue of:

i) the possession of the said drugs, and

ii) trafficking in the said drugs, on the date and time in question.

[24] We have no reason to disturb the learned trial judge's finding that the accused had exclusive care and occupation of the room in which he was arrested and that no one else had access to the said room. She had not erred in making that finding upon the totality of the evidence adduced. She stated in her grounds:

> Mahkamah juga berpuashati bahawa keterangan SP5 bahawa pintu bilik tersebut berkunci semasa beliau cuba membukanya, keterangan SP10 bahawa 1 batang kunci yang dirampas oleh pasukan serbuan dari katil dalam bilik tersebut boleh membuka pintu bilik tersebut serta keterangan pasukan serbuan bahawa kad

> pengenalan tertuduh berada dalam satu dompet duit yang dijumpai dan di rampas dari atas katil menunjukkan bahawa tertuduh ada jagaan eksklusif keatas bilik itu dan bahawa orang lain tidak ada akses ke bilik tersebut.

[25] In this connection, we have considered the printed record of evidence very carefully and concur with the learned trial judge's finding that the accused and his mother cannot be believed on the existence of the character called Ah Nam and that Ah Nam had gone to the house at 5pm carrying a plastic bag and had entered the accused's locked room, opening the door with a key retrieved from a table outside the room without any protestation or hindrance from the mother!! The trial judge stated in her grounds, *inter alia:*

> Mahkamah tidak mempercayai keterangan tertuduh dan ibunya keujudan Ah Nam dan bahawa Ah Nam telah pergi ke rumah tertuduh pada jam 5.00 petang dan memasuki bilik tertuduh dengan membawa sesuatu dalam tangannya. Mahkamah juga berpendapat bahawa pembelaan tertuduh adalah suatu pemikiran kemudian yang direka semata-mata untuk mematahkan (rebut) kes pihak pendakwaan secara terperinci.
>
> ... watak Ah Nam tidak pernah ditimbulkan oleh tertuduh dalam percakapan beramaran dalam D66 dan tidak pula diberitahu oleh tertuduh atau ibunya kepada pihak polis sehingga perbicaraan bermula walaupun tertuduh dan ibu tertuduh telah bersetuju dengan cadangan Timbalan Pendakwa Raya yang bijaksana bahawa Ah Nam adalah penting untuk membersihkan tertuduh daripada pertuduhan dalam kes ini.

[26] In determining whether the accused was in possession of the drugs the learned trial judge clearly had in mind all the leading authorities on the issue of "possession" and all the physical and mental elements necessary to constitute *mens rea* possession of the said drugs. In this case, on the factual matrix, there was no necessity to rely on any statutory presumptions under the Act to establish possession of the drugs by the accused. Having correctly made a finding on the facts that the accused had exclusive care and occupation of the room and, that no one else had access to the room, the learned trial judge made a further finding, with which we concur, that the accused had custody and control of the drugs as well as knowledge of the drugs. This was correctly based on the unfolding of the events, upon PW5 forcing open the room door and, the accused thereupon throwing away the three packages towards the bathroom. The learned trial judge stated in her grounds of judgment as follows:

A Dari keterangan saksi-saksi polis yang dihuraikan diatas, mahkamah berpuashati bahawa tertuduh telah berlari dan membuangkan 3 bungkusan plastic lutsinar yang didalamnya ada 30 paket plastic berwarna biru yang dibungkus dengan 3 helaian kertas masing-masing semasa polis memecah masuk ke dalam biliknya. Perbuatan membuang bungkusan plastic lutsinar itu menunjukkan tertuduh ada kawalan dan jagaan keatas pil-pil tersebut kerana bungkusan plastic telah dipegang oleh tertuduh dalam tangan kanannya sebelum dicampakkan. Perbuatan tertuduh mencampakkan pil-pil tersebut juga menunjukkan tertuduh ada kawalan fizikal dan kuasa pelupusan keatas pil-pil tersebut. Perbuatan tertuduh tidak membuka pintu bilik apabila SP5 mengetuk pintu dan meneriak "Polis! Buka pintu" sebanyak dua kali dan pergelutan tertuduh dengan SP5 dan SP6 menunjukkan tertuduh tahu bahawa bungkusan plastic lutsinar itu mengandungi 6,000 biji pil WY yang merupakan jenis dadah berbahaya iaitu methamphetamine.

[27] The learned trial judge having made a finding of possession independent of any statutory presumptions under the Act, in particular, s. 37(d), the only issue that needed to be addressed is whether the prosecution has proved beyond a reasonable doubt that the accused was trafficking in the said drugs. There was certainly no direct evidence of any trafficking. However, we have no reason to disturb the learned trial judge's finding that the accused was trafficking in the dangerous drugs as the weight of the methamphetamine exceeded the weight stipulated in order to invoke the presumption of trafficking under s. 37(da)(xvi) of the Act by more than twice the amount. The accused had not led any evidence that he was a drug addict and, therefore, the question whether the drugs in his possession that day were for his own consumption or not does not arise at all, to rebut the statutory presumption of trafficking under s. 37(da)(xvi) of the Act. Furthermore, taking into consideration the large quantity of pills (6000) in the three packages recovered and the manner in which they were packed, that is, in 30 small blue plastic packets, each containing 200 pills, leads to an irresistible inference that the pills were intended for distribution loosely or in packets (by sale or otherwise) to third parties known or unknown to the accused, if not for the seizure by the police.

[28] We are satisfied that the learned trial judge has not misdirected herself on the issue of trafficking and this is clearly manifested in her grounds of judgment, wherein she stated:

... mahkamah berpendapat bahawa perbuatan membuang sesuatu yang mengandungi dadah berbahaya tidak terjumlah kepada "pengedaran" sepertimana di takrifkan dalam s. 2, ADB. Walaubagaimanapun oleh kerana tertuduh ada dalam milikannya sejumlah dadah berbahaya yang bukan sahaja melebehi jumlah yang di peruntukkan dalam anggapan dalam s. 37(da)(xvi), ADB tetapi adalah dalam kuantiti yang begitu banyak sekali iaitu 6,000 biji pil methamphetamine seberat 117.5 gram yang melebehi anggapan dalam seksyen tersebut sebanyak 67.5 gram maka mahkamah berpendapat bahawa keterangan sedemikian sudah mencukupi untuk menunjukkan bahawa inferens yang tidak boleh dibendung ialah tertuduh memilikinya untuk maksud pengedaran iaitu untuk dijual atau dibekalkan kepada orang lain. Justeru itu beban pembuktian telah berpindah kepada tertuduh untuk membuktikan sebaliknya atas imbangan kebarangkalian.

[29] Upon a careful perusal of the record of appeal and carefully considering the submissions of the counsel for the accused we are unanimous that there has been no misdirection of fact or law by the learned trial judge which has occasioned a miscarriage of justice, to warrant any appellate interference. The prosecution has proved a case of trafficking against the accused beyond a reasonable doubt.

[30] The appeal is dismissed. The conviction and sentence imposed by the High Court is affirmed.